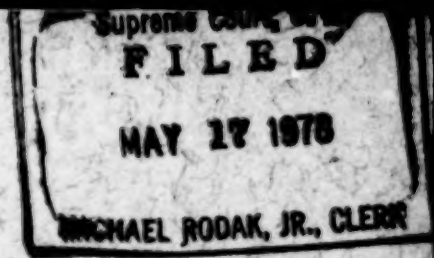


No. 77-1356



In the Supreme Court of the United States

OCTOBER TERM, 1977

REINALDO HERNANDEZ FLECHA, ET AL., PETITIONERS

v.

F. Ray MARSHALL, SECRETARY OF LABOR, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIRST CIRCUIT**

**BRIEF FOR THE FEDERAL RESPONDENTS
IN OPPOSITION**

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1977. The petition for a writ of certiorari was filed on March 24, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of Labor, in determining whether to approve the importation of temporary agricultural labor from foreign countries, may properly find that a domestic worker from Puerto Rico who is not able and

willing to accept an offer of employment fully satisfying the federally established minimum conditions is not "available" for that employment.

STATEMENT

In the fall of each year the apple harvest on the east coast requires the labor of a large number of temporary workers to work as apple pickers for a short and specified interval (Pet. App. 2b-3b). The demand for pickers often exceeds the local supply and the apple growers look elsewhere, including abroad, for workers. While preference is given to domestic workers in all hiring, a federal statutory and regulatory mechanism has been adopted which provides for the hiring of temporary foreign workers if domestic workers are not available.

This federal statutory and regulatory scheme is as follows: 8 U.S.C. 1101(A)(15)(H)(ii) provides that the term "immigrant" shall not include an alien who does not intend to abandon his foreign residence and "who is coming temporarily to the United States to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country." 8 U.S.C. 1184(a) provides, in turn, that the admission of nonimmigrant aliens to this country shall be under "such conditions as the Attorney General may by regulations prescribe," and 8 U.S.C. 1184(c) provides that "[t]he question of importing any alien as a nonimmigrant * * * shall be determined by the Attorney General, after consultation with appropriate agencies of the Government, upon petition of the importing employer."

By regulation, the Attorney General has provided that every petition for the importation of nonimmigrant alien labor shall be accompanied by a certification by the Secretary of Labor or his designated representative that

"qualified persons in the United States are not available and that the employment of the beneficiary will not adversely affect the wages and working conditions of workers in the United States similarly employed * * *." 8 C.F.R. 214.2(h)(3). The Secretary of Labor has promulgated regulations governing such certifications (20 C.F.R. 602.10, 602.10a, 602.10b). These regulations in essence require that an employer seeking certification of alien workers must file his offer of employment for U.S. workers at his local state's employment service sufficiently in advance to allow 60 days for determination of the availability of domestic workers (20 C.F.R. 602.10(b)). These offers must at least meet the minimum terms of employment established by the Secretary of Labor, including the wage rate determined to be "necessary to prevent adverse effect on U.S. * * * workers" (20 C.F.R. 602.10(b), 602.10a, 602.10b(c)).

A Puerto Rican statute, however, bars the Secretary of Labor of Puerto Rico from releasing Puerto Rican residents for itinerant work except pursuant to a "wage-benefit package" which requires more of the employer than the terms prescribed by the Secretary of Labor of the United States (Laws of Puerto Rico, Act No. 87 of June 22, 1962, as amended in 1977 (2d Regular Sess. 1962)). When the Commonwealth Secretary of Labor was unable to negotiate a contract with the apple growers on those special terms, petitioners, Puerto Rican agricultural workers, sought a preliminary injunction in the United States District Court for the District of Puerto Rico. On August 15, 1977, such an injunction was issued, ordering the United States Secretary of Labor to "declare the availability of Puerto Rican workers for the 1977 apple harvest with the full protections of Public Law 87 of 1962," thus precluding the certification for admission of temporary foreign workers for that task (Pet. App. 3a-4a).

The court of appeals stayed the preliminary injunction, however, and subsequently ruled on the merits in this case "that a worker who is not able and willing to enter into a contract of employment upon the U.S. conditions is not available within the statutory meaning when the U.S. Secretary is certifying the need for temporary foreign workers * * *" (Pet. App. 7b).¹

ARGUMENT

There is no merit to petitioners' claim that the Secretary has misinterpreted the applicable regulations and should recognize Puerto Rican workers as "available" for work in the apple harvest despite the fact that their demands exceed what the growers are willing to offer and what they are required to offer under the federal regulations.

The purpose of the statutory scheme is to strike a proper balance between assuring the employer "an adequate labor force on the one hand and to protect the jobs of citizens on the other." See *Rogers v. Larson*, 563 F. 2d 617, 626 (C.A. 3). As the court of appeals recognized, if domestic workers were declared to be available whatever their demands might be, which is the logical result of petitioners' position, the necessary effect "would be that the alien [labor] market would never be reached—the employer would have to pay whatever the domestic workers sought, it being obvious that if there were no

¹The court of appeals did not decide the case until December 28, 1977, well after the 1977 apple harvest had been concluded, and the court recognized that, as a technical matter, the appeal of the preliminary injunction was moot. Apparently because of the recurring nature of the problem, however, the court proceeded to dispose of the legal issue involved on the merits. See *United States v. New York Telephone Co.*, No. 76-835, decided December 7, 1977, slip op. 5 n. 6.

limit on the price that could be asked, workers could always be found" (Pet. App. 5b).² In these circumstances, the court below quite properly declared that the United States Secretary of Labor could certify that no domestic workers are available when no domestic workers are able and willing to accept the job under conditions fully meeting the requirements of federal law, without regard to the additional conditions of Puerto Rican law.³

Petitioners also argue (Pet. 11-15) that by allowing the admission of foreign workers the United States Secretary of Labor impermissibly interferes with the right of domestic workers to bargain and contract with

²The Secretary of Labor has no authority to set a wage rate "high enough to attract those domestic workers not otherwise willing to work." *Williams v. Usery*, 531 F. 2d 305, 307 (C.A. 5).

³In so deciding, the court below also correctly rejected the corollary proposition that the requirements of Puerto Rico's statutes could govern the implementation of the federal plan (Pet. App. 6b-7b):

* * * Puerto Rico cannot pass laws, such as minimum wage laws, for other jurisdictions. The Puerto Rico legislature may be dissatisfied with the U.S. standards, but it cannot reject those standards and at the same time insist on the benefits of the federal statute. The purpose of the statute and regulations relating to temporary workers is not to open the door for bargaining nationwide—if by Puerto Rico, it could be by every state—but to provide a manageable scheme, which that clearly would not be, that is fair to both sides. Puerto Rico may participate, or not, as it chooses, but it cannot set the terms. It is Congress which, under the Constitution, has the final say in matters of interstate commerce, and its lawfully delegated agencies that determine fair conditions of employment in interstate commerce, and neither Puerto Rico, nor any individual state.

agricultural employers.⁴ This is incorrect. While the potential admission of temporary foreign workers means that domestic workers are not the exclusive source of labor, this in no way precludes domestic workers from negotiating and contracting with employers under the statutory and regulatory plan governing certification; nor is the Secretary barred from changing those regulations where the standards of employment change. Indeed, as previously noted, domestic workers are always afforded preference in the hiring system. 20 C.F.R. 602.10; see *Elton Orchards, Inc. v. Brennan*, 508 F.2d 493, 500 (C.A. 1).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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MAY 1978.

⁴To the extent that petitioners rely on the National Labor Relations Act, 61 Stat. 151, 29 U.S.C. 151 *et seq.*, it should be observed that agricultural laborers are specifically exempted from the coverage of the Act by the provisions of 29 U.S.C. 152(3).